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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

SUMMIT HEALTH, LTD., et al.,
Petitioners,

vs.

SIMON J. PINHAS, M.D.,
Respondent.

BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF CALIFORNIA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, OHIO, PENNSYLVANIA, TEXAS, UTAH, VIRGINIA, WASHINGTON and WEST VIRGINIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

Statutes and Regulations

Miscellaneous

No. 89-1679

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INTRODUCTION

The States of California, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Ohio, Pennsylvania, Texas, Utah, Virginia, Washington and West Virginia (hereinafter "Amici States") submit this brief in support of the respondent Simon J. Pinhas, M. D. (hereinafter "Dr. Pinhas"). The decision of the Ninth Circuit in *Pinhas v. Summit Health, Ltd., et al.*, 894 F.2d 1024 (9th Cir. 1989), should be affirmed.

INTERESTS OF AMICI STATES

The Attorneys General of the Amici States are charged by law with the duty to enforce their states' antitrust laws, as well as the federal antitrust laws. In addition, they represent their states and political subdivisions in treble damage actions under the federal antitrust laws and are authorized by law to bring such actions as *parens patriae* on behalf of the natural citizens of their states.[1]

The Amici States, in their capacity as *parens patriae,* play a major role in federal antitrust enforcement. In the national enforcement scheme, the historic state role has often involved federal prosecution of violations more local in nature than those typically challenged by the United States Department of Justice. Therefore, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.[2]

Petitioners have invited the Court, through a narrowing of prior decisional law, to restrict access to federal courts on antitrust issues. The interest of Amici States is to resist the imposition or elevation of hurdles which antitrust plaintiffs must overcome in order to be heard on the merits of their claims. Further, it is to assure that, in view of the absence of certain traditionally federal causes of action under state antitrust law, antitrust plaintiffs not be left without a forum by virtue of any such proposed restriction on federal court access.

SUMMARY OF ARGUMENT

The Ninth Circuit ruling should be affirmed.

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[1] 15 U.S.C. § 15c (1988).

[2] For the same motives, the Amici States are interested in this Court's resolution of inconsistencies among the Circuits in current applications of the jurisdictional test. Leading cases from the various Circuits are cited in the Petition for Writ of Certiorari, at pages 6 and 7. *See, also, Anesthesia Advantage, Inc. v. Metz Group,*____ F.2d ____ (CA 10, No. 89-1073, 8/15/90).

Sherman Act jurisdiction turns upon the extent of the power of Congress to regulate commerce. Because that power is extremely broad, extending even to small, local activities, the jurisdictional nexus with interstate commerce should be limited to a showing that the general business activities of the defendant have the required effect. In focusing particularly on defendants' peer review activities the Ninth Circuit applied a narrower standard than necessary under this definition, but reached the correct result.

Affirming a broad standard will promote the intent of Congress in enacting the antitrust laws and fully implement the Court's reasoning in *McLain v. Real Estate Board of New Orleans,* 444 U.S. 232 (1980). It will also avoid the dangers inherent in a narrower articulation of the requirement, of leaving certain antitrust plaintiffs without a forum under either federal or state law. It would be inappropriate for the Court to attempt indirectly, through a jurisdictional determination, to fashion an antitrust exemption for participants in professional peer review.

ARGUMENT

I

THE JURISDICTIONAL REQUIREMENT OF THE SHERMAN ACT IS SATISFIED IF THE DEFENDANT'S GENERAL BUSINESS ACTIVITIES HAVE AN EFFECT ON INTERSTATE COMMERCE

In an action alleging violations of the Sherman Act, an allegation that the defendants' general business activities have an effect on interstate commerce will meet the jurisdictional requirement of a nexus with interstate commerce. Contrary to petitioners' assertions, a plaintiff need not show or allege that the defendants' precise anticompetitive conduct had an effect on interstate commerce.

The broad interpretation of Sherman Act jurisdiction which Amici States urge, is compelled by prior decisions of this Court and the legislative history of the Sherman Act. This Court has long recognized that Congress intended that the reach of the Sherman Act extend to the outer limits of its constitutional power

to regulate under the Commerce Clause.[3] Therefore, Sherman Act jurisdiction turns upon the extent of the power of the Congress to regulate the commerce in question.[4] If Congress has power to regulate a defendant's business activities under the Commerce Clause, Sherman Act jurisdiction exists accordingly over competitive restraints occurring in connection therewith.

A court hence should ordinarily focus on the interstate effects of the business activities of the defendant. *McLain v. Real Estate Board*, 444 U.S. 232, 242 (1980); *Western Waste Service v. Universal Waste Control, supra*, 616 F.2d at 1097 n.2. This focus logically arises from the underlying question, Congressional power to regulate the defendant's activities.[5] Areeda & Hovenkamp, *Antitrust Law*, ¶ 232.1c at 223 (Supp. 1988).

Congress' power under the Commerce Clause is very broad power, even extending to very small, remote and local activities that, in the aggregate, have some effect on interstate commerce.[6] For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942) (cited

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[3] 21 Cong. Rec. 2457, 3147, 6314; *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558 (1944); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974). See also, legislative history of 1980 Antitrust Improvements Act, 1980 U.S. Code Cong. & Adm. News 2716, 2733.

[4] *Western Waste Service v. Universal Waste Control*, 616 F.2d 1094, 1096 (9th Cir.) cert. denied 449 U.S. 869 (1980). *See*, Note, *Sherman Act 'Jurisdiction' in Hospital Staff Exclusion Cases*, 132 U. Pa. L. Rev. 121 (1983).

[5] The opinion in *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738 (1976), suggests the possibility that courts may be free to look at the interstate commerce links with plaintiff's business in addition to defendant's. But to focus exclusively on the plaintiff would be error. Id., at 742 n.1. *See, also, Cardio-Medical Assoc. v. Crozer-Chester Medical Center*, 721 F.2d 68, 74 (3d Cir. 1983), reversing the lower court's ruling that "the identified aspect of interstate commerce must relate to the activities of plaintiffs, and not defendants." *Cardio-Medical*, 552 F.Supp. 1170, 1177 (E.D.Pa. 1982).

[6] The Court has long emphasized that it is the existence rather than the size of an interstate effect that confers jurisdiction. *Apex Hosiery Co.*

in *McLain*), the Court held that Congress had the power to regulate a farmer's production of wheat for personal consumption, which, although "trivial by itself [is substantial when] taken together with that of many others . . . " 317 U.S. at 128. The Sherman Act has been applied, without any consideration of aggregate effect on interstate commerce, to such essentially intrastate activities as residential real estate sales [*McLain*, 444 U.S. 232], county bar association fee schedules [*Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)], and local attempts to block a hospital expansion [*Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976)].

The broad interpretation of Sherman Act jurisdiction is consistent with the Court's decision in *McLain, supra*, 444 U.S. 232 (1980). The *McLain* Court refused to "take that long backward step" in jurisdictional analysis under the Sherman Act that a restrictive interpretation would imply. *Id.* at 244-245. Instead, it reversed both lower courts, which had failed to find the requisite interstate commerce nexus in an alleged fee-fixing conspiracy among local realtors—activity that the Fifth Circuit characterized as "the quintessential local product".[7] The Court looked for, and found, the requisite nexus in the defendants' brokerage activity generally, concluding:

> "Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful."

444 U.S. at 242-43. The Court expressed particular concern that jurisdiction not "be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect[.]", holding instead that liability could be established "by proof of *either* an unlawful purpose or an anticompetitive effect." *Id.* at 243 (emphasis in the original). In the latter case, the Court cautioned, neither plaintiff's failure to quantify the adverse impact nor even an inability to prove legally cognizable damages, should

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v. Leader, 310 U.S. 469, 485 (1940). Areeda & Hovenkamp, *supra*, ¶ 232.1a at 221.

[7] *McLain v. Real Estate Board*, 583 F.2d 1315, 1319 (5th Cir. 1978).

defeat jurisdiction. *Id.* These articulated policy considerations suggest that the Court's primary objective in *McLain* was to expand the Sherman Act's reach to its furthest limits under the Commerce Clause, and hence to the most inclusive standard within reason.[8]

The broad interpretation of the jurisdictional requirement which Amici States urge, is also consistent with the realities of interstate commerce itself. As Areeda & Hovenkamp have pointedly observed:

> "Once one focuses on the inherent effects of a trade restraint in a national economy together with the long-held rule that the magnitude of interstate effects is irrelevant, there are astonishingly few offenses to antitrust principles that do not "affect commerce." There may indeed be an understandable impulse to rid antitrust law of trivia. Perhaps indeed there should be a de minimis threshold, but it would be hard to administer, and the fortuity of state lines is much too clumsy a vehicle for distinguishing the trivial from the important."

Antitrust Law, ¶ 232.1e at p. 228 (1988 Supp.).[9] The position petitioners advocate, indeed, could constitute an invitation to treat plaintiffs differently depending on how close they may be to a state boundary.

A narrower standard, particularly one as narrow as petitioners have suggested, would result in a patchwork of judicially created exclusions scissored from the otherwise cohesive, comprehensive reach of Congressional power and antitrust law over all mainstream commerce. Such a situation would only exacerbate the

[8] Where jurisdiction is invoked on the basis of facts totally unrelated to the alleged conduct, e.g. because a holding company of a local defendant also does business in other states, common sense might dictate a somewhat narrower view. *See*, I E. Kintner, *Federal Antitrust Law*, § 6.5, n. 42t, at page 295 (Supp. 1990).

[9] Pretrial dismissals on interstate commerce grounds are disfavored. *McLain*, 444 U.S. at 246; *Tiger Trash v. Browning-Ferris Indus., Inc.*, 560 F.2d (7th Cir. 1979), *cert. denied*, 439 U.S. 1034 (1979).

inconsistent treatment of antitrust plaintiffs which has already arisen from the differing interpretations of *McLain*.[10]

II

THE NINTH CIRCUIT'S FOCUS ON THE HOSPITAL PEER REVIEW PROCESS THE RESULTED IN A NARROWER STANDARD OF JURISDICTION THAN WAS REQUIRED BY THE SHERMAN ACT

In this case, the Ninth Circuit did not simply look at the nexus between interstate commerce and the general business activities of defendants. Instead it focused on the effect or probable effect of defendants' hospital staff peer review process, and the nexus between that process and interstate commerce. *Pinhas*, 894 F.2d at 1032. In doing so, the Ninth Circuit may have intended to apply a narrower standard than is actually required by the Sherman Act.[11] Since the Ninth Circuit correctly found Sherman Act jurisdiction under this standard, Sherman Act jurisdiction would exist *a fortiori* under the broader standard urged by Amici States.

The Ninth Circuit's conclusion that the hospital peer review process affects interstate commerce is entirely justified. In enacting the *Health Care Quality Improvement Act of 1986*, 42 U.S.C. § 11101 et seq., Congress made explicit findings of a nationwide medical care quality problem beyond the ability of individual

[10] The inconsistency of results both among and within Circuits has been described critically in Areeda & Hovenkamp, *supra*, ¶ 232.1d at 225-226; Note, *supra*, 132 U. Pa. L. Rev. 121 (1983); Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Cal. L. Rev. 595, 614, 629-633 (1982); and ABA, *Antitrust Law Developments (Second)* (Second Supp.) at 24-28. *See*, also, note 2.

[11] Peer review is one out of perhaps many examples of defendants' general business activities. It is not clear from the opinion whether the Ninth Circuit singled it out simply because the details were most fully pleaded, or because the court believed itself limited by law to scrutiny of that activity alone. Compare, *Musick v. Burke Vending & Catering Corp.* (CA 9, No. 89-55310, 9/7/90).

States to address adequately. Professional peer review and the interhospital, interstate exchange of information about peer review (the abuse of which Dr. Pinhas complains here), with limited antitrust immunity, is Congress' prescribed solution to the national problem.[12]

Even without this Congressional perspective, it can readily be seen that the cumulative impact of peer review, whether carried out by Midway Hospital alone or by many hospitals, would have a substantial effect on interstate commerce and on the degree of competition in the market for physician services. The cumulative effects of interstate communication of peer review results would be equally substantial.

III

CONTRARY TO THE INTENT OF CONGRESS, THE NARROW STANDARD OF SHERMAN ACT JURISDICTION PROPOSED BY PETITIONERS MIGHT FORECLOSE REMEDIES FOR CERTAIN ANTICOMPETITIVE CONDUCT

Petitioners argue that a plaintiff must allege or show that the precise anticompetitive restraint in question has an effect upon interstate commerce.[13] Such a standard is inconsistent with Congressional intent that the Sherman Act reach to the outer limit of its power to regulate commerce, and, if adopted, would work great mischief in antitrust enforcement.

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[12] Petitioners have not suggested that Congress was acting beyond its powers in enacting the 1986 Act. A ruling that recognized Congress' power to promote the peer review process through regulation but not its power to prohibit anticompetitive activities undertaken in connection with that process would be anomalous indeed!

[13] Petitioners further urged below that the interstate nexus analysis be limited to an examination of Dr. Pinhas' ophthalmic practice at Midway Hospital and the effect of its cancellation upon competition. *See*, e.g., Defendants' Reply Brief to the District Court, Joint Appendix at 276-277. It is unclear whether they continue to advocate this approach.

Petitioners' standard would have a chilling effect on both governmental and private antitrust prosecutions. It would discourage meritorious actions by creating doubt as to Sherman Act jurisdiction. In order to measure the effects of the restraint itself courts would be inclined to focus on the injury to the plaintiff; accordingly, the same violation might receive different treatment depending on who sued.

Although State antitrust law in some cases would provide an alternate forum, in others it would not.[14] Because of gaps in State antitrust laws, certain violations essentially local in nature might be left unredressed. For example, mergers of purely or largely local business entities might fall outside a narrow "interstate commerce" standard, thereby precluding challenge under the FTC Act § 5 and Clayton Act § 7,[15] upon which States and other private parties have traditionally and properly relied, and leaving no other remedy.[16] Monopolization is not prohibited by the laws of many States. Essentially local acts of monopolization might be unchallengeable under a narrow interpretation of the interstate

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[14] The broad standard Amici States advocate would not displace antitrust enforcement under state law. Broad application of both sets of laws, with consequent overlapping jurisdiction, is fully consistent with the intent of Congress and of state law. *California v. ARC America Corp.*, ___ U.S. ___, 109 S.Ct. 1661, 1666 (1989); and *see*, e.g. Texas Business & Commerce Code, § 15.25(b).

[15] Congressional history indicates that FTC Act and Clayton Act jurisdiction are to be as broad as that of the Sherman Act, notwithstanding the differences in language. The FTC Act was amended in 1974 and the Clayton Act § 7 in 1980 to add the phrase "or in any activity affecting commerce" expresly to make their reach coextensive with the Sherman Act and with Congress' authority under the Commerce Clause. 1974 U.S. Code Cong. & Adm. News, 7702, 7712-13; 1980 U.S. Code Cong. & Adm. News, 2716, 2733.

[16] Only a handful of states (Alaska, Arkansas, Hawaii, Maine, Nebraska, Texas, Washington) have antimerger statutes parallelling Section 7. In addition, a few states have statutes that prohibit anticompetitive share acquisitions but not asset acquisitions. ABA Antitrust Section: Monograph No. 15, *Antitrust Federalism: The Role of State Law* (1988), at page 61.

commerce requirement of the federal antitrust laws.[17] Moreover, many States do not have parens patriae authority under their own antitrust laws, but must rely on the Sherman Act for its exercise.[18] ABA Antitrust Section: Monograph No. 15, supra, at pages 100-101.

IV

THIS COURT'S INTERPRETATION OF THE JURISDICTIONAL REQUIREMENT OF THE SHERMAN ACT SHOULD NOT BE INFLUENCED BY ANY ALLEGED NEED TO EXEMPT THE PEER REVIEW PROCESS FROM THE FEDERAL ANTITRUST LAWS. EXEMPTION IS A POLICY DECISION FOR CONGRESS, NOT THE COURTS

Some lower courts have evidenced concern that antitrust challenges to peer review proceedings by disgruntled physicians carry the danger of frivolous litigation, burden the health care system with unnecessary costs and time expenditure, and the frustrate efforts by physicians and administrators to ensure high quality medical care.[19] The Amici States submit that, if indeed this concern is justified, it is for the Congress, not the courts, to fashion an appropriate solution. A decision by this Court attempting to resolve this concern in the guise of a jurisdictional determination would necessarily have implications far broader than peer review, impacting numerous other areas of commerce and competition, in fundamental conflict with Congressional purpose as delineated above.

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[17] States without prohibitions on unilateral monopolization include Arkansas, Colorado, Delaware, Georgia, Kansas, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, and Wyoming. ABA Antitrust Section: Monograph No. 15, *supra*, at page 53.

[18] The Commonwealth of Pennsylvania has no state antitrust statutes at all, but relies exclusively for enforcement on the federal laws.

[19] *See, e.g. Seglin v. Esau*, 769 F.2d 1274, 1283-84 (7th Cir. 1985).

Through enactment of the Heath Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101 et seq.[20], Congress has already provid d limited antitrust immunity for peer review activities meeting specified due process standards, and for participants therein. That statute affords an apt illustration of the weighing and balancing of social issues and potentially contradictory interests which are the hallmark of Congressional policy-making.[21]

By contrast, use of the interstate commerce nexus yardstick to confer immunity in peer review matters deemed by lower court judges to be "marginal"[22], ignores the need to balance these factors, constitutes a *sub silentio* exercise of legislative power, and is far "too clumsy a vehicle for distinguishing the trivial from the important."[23]

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[20] This statute was recently relied upon by the United States District Court for the Central District of California in dismissing a plaintiff's antitrust claims regarding defendants' peer review activities, and thus presents a potentially potent shield against antitrust liability for peer review defendants. *Austin v. McNamara*, 731 F.Supp. 934 (C.D. Ca. 1990).

[21] Considered and balanced, *inter alia*, are the need for improved medical care, the dangers of anticompetitive abuse of peer review power, the potential chilling effects of legal challenges, due process safeguards, confidentiality of information, and flexibility during emergencies.

[22] Several cases suggesting "marginality" of peer review proceedings to antitrust law are cited in the Brief of the California Assoc. of Hospitals and Health Systems as Amicus Curiae in Support of Petition, at page 13.

[23] Areeda & Hovenkamp, *supra*, at 228.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

DATED: September 12, 1990

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